RECORD
AND
BRIEFS

No. 15-1391

In The

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The amici First Amendment Scholars include:

- Jonathan Adler, Johan Verheij Memorial Professor of Law, Case Western Reserve University School of Law.
- Enrique Armijo, Associate Professor of Law, Elon University School of Law.
- Derek Bambauer, Professor of Law, University of Arizona College of Law.
- Jane Bambauer, Associate Professor of Law, University of Arizona College of Law.
- Ronald Collins, Harold Shefelman Scholar, University of Washington School of Law.
- David Olson, Associate Professor of Law, Boston College Law School.
- David Post, Professor of Law (ret.), Temple University Beasley School of Law.
- David Skover, Frederic Tausend Professor of Law, Seattle University School of Law.
- Saurabh Vishnubhakat, Associate Professor of Law, Texas A&M University School of Law.
- Eugene Volokh, Gary Schwartz Professor of Law, UCLA School of Law.[1]

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[1] The parties received timely notice of and have consented to this brief. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than the amici and

These scholars are all dedicated to the study of the freedoms guaranteed by the First Amendment and have published articles on this subject. Based on this experience, the amici are concerned that the decision below—and others like it, as identified in the petition—imperil the protection of commercial speech under the First Amendment. The amici thus seek to help the Court understand why certiorari should be granted in light of this important concern.

SUMMARY OF THE ARGUMENT

Imagine an electronics store in New York needs to recoup $100 on the sale of a television. If the store owner labels the television with a sticker price of "$100 plus $2 for credit card sales" or "$102, which includes $2 for credit card sales," the owner risks jail time. But if the label reads "$102, with a $2 discount for cash sales," the store owner is in the clear.

Ultimately, that is what this case is about: the criminalization of truthful commercial speech. New York has enacted a law that prohibits sellers from announcing a surcharge for credit-card sales. *See* N.Y. Gen. Bus. Law § 518; *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). This surcharge ban does not mean, however, that sellers must charge identical prices for credit-card sales and cash sales. *See*

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their counsel, contribute money intended to fund the preparation or submission of this brief.

Cert. Pet. 10–12. Instead, New York enforces its surcharge ban by instructing sellers to inflate their normal sticker prices and then announce "discounts" from these prices for cash sales. *See id.* Sellers must then tread carefully in explaining this situation to inquiring customers in order to avoid referring to a surcharge and thus committing a crime. *See id.* The most sellers can disclose is a half-truth: that their sticker prices do not apply to those who pay with cash. *See id.* at 11–12 (identifying what New York allows sellers to say about the effect of New York's surcharge ban).

The petitioners here, several New York sellers, have challenged this state of affairs as a violation of their free speech rights under the First Amendment. *See* Cert. Pet. 13–14. The Second Circuit, however, found that New York's enforcement of its surcharge ban did not curb speech at all and instead merely regulated economic conduct in terms of how sellers may set their sticker prices. *See* App. 18a, 27a.

The amici respectfully submit that the Court should grant certiorari in this case. This Court has consistently affirmed that the First Amendment protects "the consumer's interest in the free flow of truthful commercial information"—especially when it comes to truthful information about prices. *United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001); *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating state ban on truthful advertising of liquor prices); *Va. State Bd. of Pharmacy v. Va. Citizens*

Consumer Council, Inc., 425 U.S. 748, 773 (1976) (invalidating state ban on truthful advertising of prescription drugs).

The decision below stands in direct conflict with this principle. Under the Second Circuit's view, so long as a law is dressed up as a regulation of economic conduct, there is no place at all for First Amendment inquiry even if the law's main purpose or effect is to restrict the free flow of truthful commercial information about prices to consumers. And that is what New York's surcharge ban achieves by presenting sellers with a Hobson's choice: either announce sticker prices that keep people in the dark about the extra costs of credit-card processing, or announce sticker prices that disaggregate these costs for the consumer at the risk of fines and jail time.

This Court should therefore grant review to clarify when laws or policies that purport to regulate economic conduct still merit scrutiny under the First Amendment and its protection of commercial speech. Such clarification is vital not only to resolve a circuit split on the kind of surcharge ban that is at issue in this case but also to preserve the First Amendment's status as a bulwark against government attempts to suppress truthful commercial information.

ARGUMENT

I. This Court should grant review to clarify when a regulation of economic conduct is really a curb on commercial speech.

Time and again, this Court has recognized that the First Amendment protects the "consumer's interest in the free flow of commercial information." *Va. State Bd. of Pharmacy*, 425 U.S. at 763. The robustness of this protection, however, hinges on the ability of lower courts to recognize state restrictions on commercial speech in whatever guise they may take, including as purported regulations of economic conduct. This case presents the Court with an ideal vehicle to address this problem—a problem that has split the circuits and that "has not been, but should be, settled by this Court." Sup. Ct. R. 10.

In this case, the Second Circuit found that New York's surcharge ban raised no First Amendment concerns whatsoever. As the panel put it, what New York's surcharge ban "regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." App. 21a–22a. For this reason, the panel found that the ban "regulate[d] conduct, not speech" and viewed the ban's purpose and effect through this perspective. App. 27a; *see, e.g.*, App. 24a (observing the government may ban prices based just on "how consumers will react to them").

The panel took a short-sighted view of the facts and the law, however, to find that the key ingredient to

criminal liability under New York's surcharge ban—a "sticker price"—was not speech. To be sure, on its face, this ban may appear to regulate conduct. Under the ban, "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The ban might therefore seem to prohibit sellers from charging different prices to consumers based on a consumer's mode of payment.

But that is not how New York enforces this ban. New York sellers *can* use mode-of-payment to vary the ultimate price that customers pay. *See* Cert. Pet. 10–12. The ban only affects how sellers explain this price variance to consumers. *See id.* New York will penalize sellers whose sticker prices say "$100 plus a $2 surcharge for credit-card sales." *See id.* New York may also penalize sellers who state their sticker prices as "$102, which includes a $2 credit-card surcharge," or who state two sets of sticker prices—a credit-card price and a cash price—if the contextual language indicates a surcharge. *See id.* But New York will not penalize sellers who state a sticker price as "$102, with a $2 discount for customers who decide to pay by cash." *See id.*

As such, a seller's criminal liability under New York's surcharge ban turns on how a seller explains her prices. This ban does not regulate prices, nor does it combat customer confusion. What the ban does—and all that it does—is restrain sellers from making the costs of credit-card payments obvious to consumers. This brings the First Amendment into the picture. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011)

("An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated.").

The Second Circuit's failure to appreciate this feature of New York's surcharge ban—and the necessary First Amendment consequences that follow from it—should concern the Court. This myopia reflects a troubling willingness on the part of some lower courts to uncritically accept a state's attempt to disguise its efforts to restrict commercial speech as a mere regulation of economic conduct. The Second Circuit here, for example, decried petitioners' "bewildering persistence" in claiming New York's surcharge ban violated the First Amendment (App. 21a)—a claim that the district court found not only had merit but was also conclusive. *See* App. 85a.

The Eleventh Circuit has not made this error. *See Dana's R.R. Supply v. Att'y Gen., Florida*, 807 F.3d 1235 (11th Cir. 2015). Analyzing Florida's surcharge ban—which is like New York's—the panel recognized that while this ban "purport[ed] to regulate commercial behavior," it had "the sole effect of banning merchants from uttering the word *surcharge*, criminalizing speech that is neither false nor misleading." *Id.* at 1251.

The Eleventh Circuit also used a simple analogy to illustrate this point: imagine a law that prohibits restauranteurs from serving "*half-empty* beverages" while expressly allowing restauranteurs "to serve

half-full beverages." *Id.* at 1245. Any claim that the law regulates conduct (i.e., how beverages are to be served) would be specious. Liability under this law "turns solely on the restauranteurs' choice of words." *Id.* If a restauranteur serves a half-glass of wine to a diner and the diner asks for a description of how much wine is in the glass, the restauranteur risks jail time only if he says that the glass is "half-empty." *See id.*

The Eleventh Circuit's analysis follows this Court's view that while a law "may be described as directed at conduct," the First Amendment still applies when "the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). The Eleventh Circuit's analysis also comports with basic common sense, for courts cannot hope to "do justice to the concerns of free speech" unless they "delve beyond superficial form, disregard[ing] mechanical formulas and preconceived prejudices that have existed in this area."[2]

The decision below thus warrants review by this Court to help lower courts identify when regulations that superficially concern economic conduct are, in fact, restrictions on commercial speech that merit First Amendment review. Absent this Court's intervention, the Second Circuit's ruling stands to reduce the

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[2] Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 473 (1971).

commercial speech doctrine to "a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Put another way, under the decision below, the government may successfully use concepts like "sticker price" to disguise what is unquestionably a restriction upon truthful communication.

Little imagination is necessary to conceive of the myriad ways in which this rule may be abused to the detriment of free speech—and not just commercial speech. Consider a town council that decides to impose a "soda tax" to combat public obesity but also seeks to stifle criticism of this policy from grocers, soda manufacturers, and members of the public. The council therefore passes a law requiring all grocers to incorporate this tax into sticker prices for soda. As a result, under this law, the first sales invoice below is unlawful while the second sales invoice is lawful:

Unlawful Sales Invoice

12-oz soda	$1.00
Soda tax	$2.00
Total	$3.00

Lawful Sales Invoice

12-oz soda	$3.00
Total	$3.00

Both invoices put customers on notice about the total amount they will pay. The difference is in how the underlying prices are expressed, how they are framed, and how they are likely to be perceived. There also can

be no question that any effort by the government to stifle expression about taxation would implicate the First Amendment's core protection of political speech. Yet, under the Second Circuit's logic here, any grocer who objects to the town council's new law has no First Amendment claim because all the law appears to do is regulate the conduct of tax collection.

This is not a theoretical problem, as the state of Kentucky has proven. Kentucky tried to ban telecom providers from listing a new telecom tax on customer bills. *See BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 500–01 (6th Cir. 2008). The Sixth Circuit correctly found, in turn, that the First Amendment applied to this ban as Kentucky had "no objection to the [telecom] providers' conduct (raising prices to account for the new tax), just [the providers'] speech (saying why [they] ha[ve] raised prices)." *Id.* at 506.

The Court should therefore take this case in order to provide lower courts the clarity they need to recognize the obvious—that laws like New York's surcharge ban regulate protected commercial speech, not conduct. This does not mean, however, that the First Amendment invalidates these laws. These laws may still survive First Amendment review if they are in fact tailored to an important government purpose. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

The bottom line, however, is that in cases like this one, the First Amendment applies. That is why this

case is so important. When the state decides to "impos[e] criminal liability for . . . the 'wrong choice' between equally plausible alternative descriptions of an objective reality," courts must hold the state to the "robust protections of the First Amendment." *Dana's R.R. Supply*, 807 F.3d at 1246.

II. This Court should grant review to prevent government suppression of truthful speech that consumers deserve to hear.

This Court has determined that commercial speech is protected under the First Amendment not only because society has a strong interest in "the free flow of commercial information" but also because consumers are entitled to the truth when it comes to commercial transactions. Government officials thus cannot "completely suppress the dissemination of concededly truthful [commercial] information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Va. State Bd. of Pharmacy*, 425 U.S. at 773.

New York's enforcement of its surcharge ban transgresses this principle in a remarkable manner that warrants this Court's attention. New York does more than prevent sellers from educating consumers about the real costs of paying by credit card. New York also tells sellers to hide these costs from consumers by manipulating sticker prices and then offering "discounts" to cash users. *See* Cert. Pet. 10–12. And New York does this not to protect consumers' interests but

rather to protect the credit-card industry. *See* Cert. Pet. 6–10.

New York's surcharge ban thus strikes at the heart of this Court's First Amendment jurisprudence. This jurisprudence prioritizes the protection of those who seek to speak the truth. For this reason, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979). And truth is even more central to the protection of commercial speech under the First Amendment, for "[i]t is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed." *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

Hence, where this Court has upheld restraints on commercial speech, the Court has done so because the restrictions at issue advanced truth in advertising. As this Court has noted, "[p]ermissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 574. In this vein, these permissible restraints have required commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent [their] being deceptive." *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

New York's enforcement of its surcharge ban, however, prohibits sellers from using their sticker prices to give information, warnings, or disclaimers about the

true costs of paying by credit card. *See* Cert. Pet. 10–12. Sellers must instead adopt a veritable "party line" recommended by New York officials that turns surcharges on credit-card payments into "discounts" for cash payments. *See id.* New York believes this language will "protect[] consumers against irrational psychological annoyances." App. 23a.

The First Amendment, however, "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 517 U.S. at 503 (plurality op. joined by Stevens, Kennedy, and Ginsburg, JJ.). For good reason. When the "government prevents willing speakers from speaking the truth to audiences in order to manipulate their decision-making, it engages in an especially offensive form of paternalism."[3]

Such paternalism is a problem with respect to state restrictions on commercial speech because this speech "contribute[s] directly to human autonomy."[4] Individuals make "meaningful and expressive choices through commerce."[5] A person can "buy fair trade coffee, drive a hybrid car, and avoid fast food chains that

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[3] Steven Shiffrin, *The First Amendment & Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1259 (1983).

[4] Jane Bambauer & Derek Bambauer, *Information Libertarianism*, 105 CAL. L. REV. (forthcoming 2017) (manuscript at 46), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741139.

[5] *Id.* (manuscript at 46).

oppose gay marriage."[6] Consequently, in modern America, a person's interest in commercial speech is often "as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

New York's surcharge ban thus raises far more First Amendment concerns than the Second Circuit recognized. New York may of course directly ban all forms of price differentiation between customers who pay with credit-cards and those who pay with cash. This direct regulation would raise no First Amendment problems, and it would more obviously and transparently reveal the legislature's end goal—to subsidize the credit-card industry."[7]

What New York cannot do is try "to accomplish the same purpose" of a real surcharge ban "through a policy of consumer ignorance, at the expense of the free-speech rights of . . . sellers and purchasers." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 498 (1995) (Stevens, J., concurring). And that is what is at issue here. New York's surcharge ban, as applied, removes sticker prices from the vocabulary of true commercial speech that allows both sellers and consumers to form "intelligent opinions as to how [our nation's free enterprise] system ought to be regulated or altered." *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

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[6] *Id.* (manuscript at 46).

[7] *See id.* (manuscript at 31).

Yet, this is the point of New York's surcharge ban given that it is the brainchild of the credit-card industry rather than an objective legislative effort to protect consumers. *See* Cert. Pet. 6–10. The ban shields the credit-card industry from criticism by keeping credit-card users in the dark about swipe fees and causing cash users "to subsidize the retail purchases of credit-card users." App. 59a. The ban thus embodies the "capture of governmental power by a self-serving faction of commercial actors seeking to entrench its own economic interests."[8] Those interests, however, should not be allowed to trump the First Amendment, whose very purpose is "to preserve an *uninhibited* marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (emphasis added).

CONCLUSION

The Court should grant certiorari in this case to provide much-needed guidance to lower courts about when the First Amendment applies to purported regulations of economic conduct. The Second Circuit failed to recognize that the First Amendment applied here because the panel was unwilling to look past the conduct-based veneer of New York's surcharge ban. But this veneer does not change the ban's purpose and effect, which is to prevent sellers from using their sticker

[8] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 241 (1992).

prices to communicate the true price of credit-card transactions to consumers. Nor can this veneer subvert the meaning of the First Amendment, which properly applies whenever the government "seeks to prevent the truth from being disseminated."[9] The Court should use this case to make that clear.

Respectfully submitted,

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[9] Shiffrin, *supra* note 3, at 1256–57.